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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, INC., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 19, 2016

2:01 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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Doc #9829 Hearing on Motion to Compel Compliance With Subpoena
by Ally Financial, Inc. (related document(s) 9810, 9808)

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RESIDENTIAL CAPITAL, INC., et al.

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 We're here on Residential Capital, 12-12020. We're
4 here in connection with the motion to compel compliance with
5 subpoena by Ally Financial, Inc.

6 Can I have the appearances, please?

7 MR. RUSSELL: Good afternoon, Your Honor. William
8 Russell, Simpson Thacher & Bartlett LLP. With me is my
9 colleague David Gallo. We're here on behalf of movants-
10 defendants MortgageIT, Inc. and DB Structure Products, Inc.

11 THE COURT: Thank you.

12 MR. PARISH: Good afternoon, Your Honor. Jason Parish
13 from Kirkland & Ellis for Ally Financial, Inc.

14 THE COURT: Thank you.

15 MR. NESSER: Good afternoon, Your Honor. Isaac Nesser
16 of Quinn Emanuel for the ResCap Liquidating Trust and RFC. And
17 here with me is Tom Lepri of my firm.

18 THE COURT: Thank you.

19 Mr. Russell.

20 MR. RUSSELL: Good afternoon, Your Honor.

21 I'd like to begin by asking the Court actually a
22 question, if I may. When we had the telephone conference on
23 April 1, Your Honor indicated that the Court was considering
24 referring at least part of the motion to Judge Nelson. I'm not
25 sure of the status of that, whether you'd like us to address

1 the entirety of the motion today, or to limit our comments and
2 argument to just the submissions of the examiner?

3 I don't want to take up the Court's time --

4 THE COURT: No.

5 MR. RUSSELL: -- in argument that may be unnecessary.

6 THE COURT: No, it's a very fair question.

7 Judge Nelson and I had a brief conversation. And she
8 expressed willingness for me to refer matters to her. I told
9 her -- I discussed with her, and she had no problem, I said I
10 would retain the issue of whether the confidentiality agreement
11 or protective order protected Ally from having to produce. But
12 beyond that, that she would do that. I need to have another
13 conversation with her.

14 While we're hearing your motion today, I have heard
15 the argument on the motion to compel MBIA to produce documents.
16 And there was -- I hadn't raised with them before the hearing
17 the issue of referring matters to Judge Nelson. In a letter
18 after the argument, they agreed.

19 I think you'll see when you hear some of my questions
20 today -- I don't want to get -- I'll make this clear, I don't
21 want to get in the middle of regulating discovery in the
22 Minnesota actions. I do think it's appropriate for me to
23 decide whether either the confidentiality agreement or the
24 protective order protect Ally or MBIA in its matter from having
25 to produce documents. So there may not be a completely clear

1 answer.

2 I intend to have another conversation with Judge
3 Nelson, hopefully this week. And that's the best I can tell
4 you now. Okay.

5 MR. RUSSELL: I think so. If I could ask one more
6 question --

7 THE COURT: Sure.

8 MR. RUSSELL: -- just so I'm clear? Would you like to
9 address the entirety of the motion, or would you like me really
10 to limit my comments to the issue you mentioned, Your Honor.
11 That's whether the confidentiality agreement, protective order
12 provide some sort of protection and prohibition on the
13 disclosure of the examiner materials.

14 THE COURT: Let me see if I can frame the issue a
15 little --

16 MR. RUSSELL: Sure.

17 THE COURT: -- the issues a little better.

18 So as I understand it, Ally produced documents
19 pursuant to the examiner's subpoena. And that production, it's
20 my understanding -- and if the parties disagree they'll tell
21 me -- was subject to the protective order, the uniform
22 protective order, that was entered and I did enter. And it
23 has -- it's a lengthy document, it -- like most protective
24 orders, it has various categories of protection. Those things
25 that are designated confidential, those things that are

1 attorney's eyes only. I think there's a designation of "highly
2 confidential" under the uniform protective order because -- as
3 certainly you argue and Ally can respond to -- you presented
4 that they basically stonewalled you. My term, not necessarily
5 your term, but that's essentially what I take away from your
6 motion. You tried to engage them in a meet-and-confer, narrow
7 the request for production, and you feel you've been
8 stonewalled. Okay.

9 So I don't know at this stage whether -- how they
10 have -- what designation they've given to the documents that
11 they've produced to the examiner, and I need to know a little
12 bit more about that. Let me hone in on one area in particular.

13 Under the uniform protective order, it has provisions
14 for preserving attorney-client privilege and attorney work
15 product. And it requires that any documents for which such
16 protection is sought have to be labeled "highly confidential".
17 I don't know whether there are documents that Ally produced to
18 the examiner that labeled highly confidential or not.

19 I'm not prejudging anything, but I mean
20 designating -- you make this point in your papers, designating
21 documents as confidential doesn't make them so, doesn't make
22 then nondiscoverable in another matter, for example. And so
23 generally speaking, and you're not a party to the uniform
24 protective order, and you're representing defendants in the
25 action in Minnesota -- actions plural -- and if the documents

1 you're seeking are relevant and material to a defense of those
2 actions, they're ordinarily discoverable.

3 My understanding is, and you can confirm this, that
4 there is a protective order in place in Minnesota, and whatever
5 documents Ally produces, they can produce it pursuant to that
6 protective order. And if there's disputes about what they
7 designated confidential, Judge Nelson or one of the magistrate
8 judges assigned to the matter will resolve the issue. Am I
9 right so far?

10 MR. RUSSELL: Your Honor, you pretty much summarized
11 my argument

12 THE COURT: Right.

13 MR. RUSSELL: -- on those points. So --

14 THE COURT: Right.

15 So, as you know, I ordered Ally to produce for in-
16 camera review the submission -- what in the separate
17 confidentiality agreement is identified as "submission papers".
18 And the confidentiality agreement doesn't have the imprimatur
19 of this Court; it was entered into between the examiner and
20 various other parties, including Ally.

21 At the last MBIA hearing, Mr. Nesser was there, and he
22 argued that the papers that the Trust had submitted didn't make
23 the argument. He argued that the submissions were -- they may
24 have gotten some protection from the confidentiality agreement,
25 but were subject to the uniform protective order. That was the

1 first I'd heard that.

2 MBIA produced its submissions, and it turned out there
3 were two rather than one. There was an initial one and there
4 was a reply. And I've examined them in camera. It was after
5 reviewing those that I entered an order requiring Ally to
6 produce its submission paper for in-camera review, and I've
7 reviewed that.

8 And when Mr. Harris addresses me, he's going to
9 address specifically the AFI submission paper to the examiner
10 does not contain any legend designating -- I'm going to be very
11 specific -- it has no legend designating the submission paper
12 as highly confidential. I mean, I'll tell you, both the MBIA
13 submission papers -- plural, because there are two -- and the
14 Ally submission paper, have what I would characterize as
15 classic work product. It's an attorney document; they're
16 essentially briefs addressing legal arguments. That's work
17 product. Under the uniform protective order, it would have had
18 to be identified -- labeled as "highly confidential". If the
19 uniform protective order applied in order to protect work
20 product, it would have to be designated as highly confidential,
21 and there is no such designation on what I reviewed in camera.

22 What complicated the analysis for me is, somewhat to
23 my surprise until I received the MBIA submissions in camera,
24 first I didn't know there were two -- everybody had seemed to
25 be talking about one -- but lo and behold it was designated as

1 subject to protective order. Well, the only protective order
2 entered is the uniform protective order. And it said "and
3 con" -- it said "protective order and confidentiality
4 agreement". It didn't include a designation on the documents
5 of highly confidential. But MBIA says it doesn't object to the
6 production. But the Ally submission paper, which doesn't
7 identify itself as highly confidential, doesn't purport to say
8 that it's subject to the uniform protective order, specifically
9 addresses the issues raised in MBIA's opening paper. And then
10 MBIA files a reply addressing arguments that were made.

11 So I'm just laying out for everybody what -- I got
12 this big pile of papers, some of it is the things that were
13 submitted in camera and some of it is just cases that I've
14 read.

15 It might make more sense, Mr. Russell, if I hear from
16 Mr. Harris (sic) first, and then give you a chance to
17 responded. Okay?

18 MR. RUSSELL: Your Honor, I think that does make
19 sense.

20 THE COURT: Yeah.

21 MR. RUSSELL: Because as I said before, the Court I
22 think has summarized my arguments for me. Ally has not
23 produced any --

24 THE COURT: Oh, yeah.

25 MR. RUSSELL: -- documents to us, so I can't comment

1 on what's in the written submission.

2 THE COURT: Let me just say -- okay, let me hear from
3 Mr. Harris (sic).

4 MR. RUSSELL: Thank you, Your Honor.

5 THE COURT: Thank you very much, Mr. Russell.

6 MR. PARISH: Good afternoon, Your Honor. Jason Parish
7 for --

8 THE COURT: Oh, Parish, I don't --

9 MR. PARISH: Parish with a "P".

10 THE COURT: Yeah, you put it in -- I apologize for
11 mishearing.

12 MR. PARISH: My handwriting is really bad.

13 THE COURT: No, no, it's my hearing. And go ahead.
14 Now I hear you loud and clear, okay.

15 MR. PARISH: So I'm happy to talk about the context of
16 why we're here, sort of what happened before the motion was
17 filed, and then go into the -- address the specific argument
18 that we have related to the examiner production, if that would
19 be helpful. Otherwise, I can sort of skip the preliminaries
20 and go right to --

21 THE COURT: I think you can skip the preliminaries,
22 because yes, I made the comment that Mr. Russell sort of -- my
23 term, not his, that you've stonewalled him. I don't so much
24 believe it and I don't really care about it. What I care about
25 is what the position is today and what I have to rule. So

1 let's deal with -- let's say it's fresh.

2 You got this, you've asserted confidentiality -- but
3 let's deal, if you would if you don't mind, Mr. Parish, deal
4 first with the documents that were produced pursuant to
5 subpoena under the uniform protective order. Okay?

6 MR. PARISH: And to set the table, the first and
7 second arguments that we made in our supplemental brief related
8 to the relevance of the documents that Ally produced to the
9 examiner, and the breadth of the request for those documents
10 that's been propounded by the defendants.

11 THE COURT: I want to interrupt you for one minute,
12 because, Mr. Russell, I might have a different view about what
13 Ally has to produce if it relates to the RMBS issues that are
14 involved in the Minnesota cases. And I have some of the cases
15 here, so I'm not blind to this. Whatever I'm going to rule is
16 going to come back to bite me because it's going to come up in
17 the cases here. Mr. Johnson isn't here; he argued last time,
18 so I -- and I know that, he's losing cases there and cases
19 here. Okay.

20 But what's the breadth of what you're seeking? I
21 mean -- because Ally -- the examiner's subpoena was very broad.
22 There are a lot of other issues. I mean, you read the
23 examiner's report and you can see the scope of the issues that
24 the examiner addressed and there -- not all, but there are
25 certainly quite a few that address Ally. And if what you're

1 telling me is that you're prepared to narrow your request for
2 the documents that Ally produced that -- I'm going to shorthand
3 it, it may not be the exact definition, but there are -- they
4 relate to the RMBS claims because that's what the litigation in
5 Minnesota is about. Could you tell me why?

6 MR. RUSSELL: Sure.

7 THE COURT: You can stay up there, Mr. Parish, because
8 I just want to -- I just want to see if I can -- I want to see
9 how broad the dispute is between --

10 MR. RUSSELL: Your Honor is correct; we agreed to
11 narrow -- first we told Ally kind of the areas we were
12 particularly interested in, and then we actually agreed to just
13 narrow our request to five specific requests. One of which is
14 all materials produced to the examiner.

15 THE COURT: That's overbroad, okay.

16 MR. RUSSELL: Sure. Sure, I understand that, Your
17 Honor.

18 The other areas in which we're interested essentially
19 go to the RMBS claims asserted against Residential Funding
20 Company, kind of the strength and merits of those claims, and
21 in addition, the settlement reached in front of Your Honor. So
22 it's not just the claims themselves, but the settlement
23 because, in essence, what's going on in Minnesota, as in I
24 think the cases in front of you as well, Your Honor, RFC is
25 suing the defendants seeking indemnification for the cost

1 incurred in the bankruptcy including the settlement. So the
2 reasonableness of the settlement, and not just the recent --

3 THE COURT: Well, let me ask you this. Do you agree
4 that Ally need not produce documents that are covered by the
5 mediation privilege about which I have specifically have
6 written?

7 MR. RUSSELL: I --

8 THE COURT: You're not seeking -- so it may be
9 that -- because as soon as you say the reasonableness of the
10 settlement, well, they give -- there was a mediation that went
11 on for, I don't know, six, nine months by my former colleague
12 Judge Peck, and Ally was a very active partner, and put up at
13 the end of the day 2.1 billion dollars as a result. And I
14 don't know what's going -- whether it's going to protect every
15 scrap of paper that was in that time period, but substantially.
16 And so -- you're not trying -- are you trying to backdoor on
17 the mediation privilege?

18 MR. RUSSELL: Absolutely not, Your Honor.

19 THE COURT: Okay.

20 MR. RUSSELL: Defendant's filed a motion in front of
21 Your Honor last year.

22 THE COURT: I know.

23 MR. RUSSELL: You Honor ruled, the ruling is very
24 clear.

25 THE COURT: Okay.

1 MR. RUSSELL: And we've been very clear with Ally --

2 THE COURT: Okay.

3 MR. RUSSELL: -- since August 28th when we had your
4 decision --

5 THE COURT: Right.

6 MR. RUSSELL: -- that we're not seeking any materials
7 protected by your mediation order.

8 THE COURT: All right. Could I ask -- I just want to
9 see if we can cut -- see if we can cut through it. Do you
10 agree to limit -- and I know -- which is typical for
11 negotiations, let's prioritize it, let's figure out what order.
12 But I didn't see you saying we'll withdraw our request for any
13 documents that don't relate to the RMBS claims. I do have a
14 problem if you were seeking documents that go beyond your --
15 that've been produced to the examiner pursuant to the uniform
16 protective order, that go beyond the issues in the Minnesota
17 litigation or the litigation here.

18 MR. RUSSELL: Sure. And, Your Honor, if there are --
19 let me take a step back.

20 THE COURT: Okay.

21 MR. RUSSELL: If Ally wants to simply give us the
22 examiner production because it's easier for them --

23 THE COURT: I bet they won't.

24 MR. RUSSELL: If they did --

25 THE COURT: I bet you they won't.

1 MR. RUSSELL: We're happy to do the work as sorting
2 the wheat from the chaff.

3 THE COURT: Yeah, I'm sure.

4 MR. RUSSELL: Assuming they don't --

5 THE COURT: Okay.

6 MR. RUSSELL: -- if there are documents in that
7 production say related to Ally's interest in other companies
8 other than RFC, yeah, they're not relevant, we have no interest
9 in them.

10 THE COURT: Well, I would leave it to you and Mr.
11 Harris (sic) and his colleagues to enforce this and sort out
12 the definition, because I'm not trying to write it --

13 MR. RUSSELL: Sure.

14 THE COURT: -- now; I'm shorthanding it by saying
15 relevant to the RMBS claims. That helps, let me -- I'm going
16 to accept your representation that you are limiting your
17 request for production relating to Ally's submission to the
18 examiner to RMBS claims appropriately defined, and not
19 including anything subject to a mediation privilege; is that a
20 fair statement?

21 MR. RUSSELL: It is. If I could clarify one point --

22 THE COURT: Go ahead.

23 MR. RUSSELL: -- because I don't want to ever be
24 accused of --

25 THE COURT: Yeah.

1 MR. RUSSELL: -- of sandbagging the Court or the
2 parties.

3 THE COURT: It wouldn't be a good thing.

4 MR. RUSSELL: One, I want to be clear, we're not
5 seeking anything --

6 THE COURT: Okay.

7 MR. RUSSELL: -- covered by the mediation --

8 THE COURT: All right.

9 MR. RUSSELL: -- order. I don't want to narrow it to
10 just RMBS claims, because we are seeking, to the extent there
11 are documents related to the settlement for which RFC is trying
12 to hold us liable that aren't protected by the mediation
13 order --

14 THE COURT: Okay.

15 MR. RUSSELL: -- we would like those documents as
16 well.

17 THE COURT: All right, I understand that. Okay,
18 thanks.

19 MR. RUSSELL: With that clarification, you have it
20 absolutely right, Your Honor.

21 THE COURT: All right. Well, it was, thanks very
22 much, Mr. Russell. Mr. Harris -- Mr. Parish.

23 MR. PARISH: Yes, Your Honor.

24 Maybe -- it seems like there's a way to sort of
25 address this in a global way, which I think we were looking to

1 do in the period leading up to the filing of the motion.

2 THE COURT: Well, we're dealing with it today, so
3 what's your suggestion.

4 MR. PARISH: Because the request for the examiner
5 production, even limited as Your Honor laid out, and a request
6 for the other categories of documents all overlap to some
7 degree. So what I think makes sense here, what may avoid this
8 thicket of issues involving the protective order and the
9 confidentiality agreement would be for the parties to meet and
10 confer on a limited custodial production of documents. They
11 have given --

12 THE COURT: Well, that should have happened already,
13 so I don't know if your firm -- you haven't been before me
14 before, but lots of your colleagues have been in the ResCap
15 matters and know very well what my procedures for discovery
16 disputes are, and they very clearly require a meet-and-confer
17 before you stand up in my court in responding to this motion to
18 compel compliance. Let me ask you a few more questions.

19 In your examiner production, pursuant to a subpoena --

20 MR. PARISH: Yes.

21 THE COURT: -- are there documents that you designated
22 as highly confidential because you believe they contain
23 attorney-client privilege or work product?

24 MR. PARISH: There are documents that are designated
25 as highly confidential.

1 THE COURT: No, I'm asking specifically are they --
2 look --

3 MR. PARISH: I --

4 THE COURT: I'm specifically ask -- I really -- let
5 me -- I'll reframe it then. Are there documents that you
6 produced to the examiner pursuant to the uniform protective
7 order that Ally contends are protected by attorney-client
8 privilege or attorney work product?

9 MR. PARISH: I can't say with certainty that there
10 are.

11 THE COURT: Have you looked?

12 MR. PARISH: I have looked. I expect that there are,
13 but I don't know that for certain.

14 THE COURT: Okay.

15 MR. PARISH: I mean that total production is --

16 THE COURT: But the reason I'm raising this is because
17 the uniform protective order provides -- has clauses that
18 provide the protection that Federal Rules of Evidence, is it
19 503 -- you remind me, Mr. Nesser, because this came up the last
20 time, which I don't have -- I didn't bring my evidence rules
21 out with me and I think --

22 MR. RUSSELL: I think it's 502(d), Your Honor.

23 THE COURT: 502(d); thank you, Mr. Russell.

24 So 502(d) permits parties to produce privileged work
25 product document without waiving that if the Court orders it,

1 and I did. Okay. So I kind of put that in one corner. I had
2 my doubts -- well, you either did or didn't produce documents
3 that fall into that category.

4 But anything else that you designated confidential or
5 highly confidential, that doesn't create a privilege or
6 protection against production. It may be it has information
7 that would be subject to Bankruptcy Code Section 107(b),
8 proprietary business information, things like that. It doesn't
9 protect it from production; it just protects it from public
10 disclosure. That's what discovery protective orders are, in
11 part, designed to do. And I don't know whether I've seen one
12 that Judge Nelson entered, but I'm sure it has that kind of
13 protection in it.

14 So, look, I've got everything in front of me now; this
15 is -- I have two of these proceedings in front of me. Ally
16 needs to produce anything that relates to the RMBS claims or
17 the reasonableness or evaluation of the settlement that's not
18 protected by attorney-client privilege, attorney work product,
19 or the mediation privilege. I'm putting aside the examiner,
20 the submission paper, okay. I'm only talking about what was
21 produced pursuant to the uniform protective order.

22 MR. RUSSELL: And, Your Honor, and to clarify we're
23 talking about documents within the examiner production?

24 THE COURT: Yes, I am. I'm talking about documents
25 within the examiner production. And if you get into a dispute

1 with Mr. Russell because you think this particular document or
2 a handful of particular documents -- the protective order
3 requires you to label them. And if you didn't label them
4 highly confidential, you can't preserve attorney-client
5 privilege or attorney work product. It's really as simple as
6 that; the protective order is clear on its face. Okay.

7 But if there are documents you labeled attorney-
8 client -- that you labeled as highly confidential, and you have
9 a dispute about whether you have to produce them or not, you'll
10 come back to me about it because that relates to the uniform
11 protective order that I entered, all right, I approved. When I
12 say I approved it; there was a form of uniform protective order
13 that was approved by the Court -- by Court order, and I didn't
14 have to sign every single -- thereafter sign every single
15 protective order that used that form; it was designed that way
16 to expedite the process.

17 Okay. So that -- you need to meet with Mr. Russell
18 promptly in an effort to resolve these issues. I'm not -- I've
19 shorthanded when I say related to RMBS claims. And you need to
20 try and get that worked out promptly. There are discovery
21 deadlines that Judge Nelson has imposed. And I'm not going to
22 let you or anyone else try to run out the clock.

23 MR. PARISH: Your Honor, to be clear, we're not trying
24 to run out the clock.

25 THE COURT: Okay. I'm just making clear to everybody,

1 okay, nobody's going to -- because I don't want to have Judge
2 Nelson come back and say to me, they've been before you for how
3 many months, and they still don't have production; it's slowing
4 down my cases, here. That's not going to happen. Okay. So
5 this needs to get clarified very quickly. But there just --
6 you don't gain protection for documents by the fact that you
7 produced -- you gave them to the examiner pursuant to subpoena,
8 with the exception of the attorney-client privilege work
9 product documents, okay, because that privilege was preserved,
10 not waived.

11 So now it's come to the examiner submission paper.
12 And I did review it in camera, and I commented already. There
13 was no -- frankly, unlike the MBIA submission papers, which
14 did -- I'll find it.

15 The legend on the MBIA documents, and there are two,
16 two document, says, "Confidential materials enclosed subject to
17 court orders and terms of confidentiality agreements". The
18 court order -- the only court order I'm aware of is the uniform
19 protective order. But MBIA is not objecting to production, and
20 I'm sure I'll hear Mr. Nesser, but there -- with respect to
21 MBIA, their discovery in one of the actions was completed; they
22 produced expert reports. Mostly what they rely on in the MBIA
23 submission their expert reports produced pre -- that were
24 created pre-petition. They're not subject, in my view, to any
25 protection. MBIA can -- if they wanted to assert privilege,

1 they could have asserted privilege or protection. They could
2 have, but they didn't, they said they had no objection to
3 producing it.

4 It's the reply which does address things in your
5 client's submission that at least gave me pause because I said
6 well, I better see what Ally put on its submission. Did they
7 say highly confidential? Did they say it was subject to the
8 uniform protective order? Well, it didn't. You want to
9 address that?

10 MR. PARISH: You are correct; the document itself is
11 not designated as confidential. And I don't know what the
12 history was leading up to that. There may have been that there
13 were discussions among the parties about how these would be
14 treated; it may not be the case.

15 In February 2013, though, the parties and the examiner
16 entered into a confidentiality agreement. And our position,
17 and the basis for our objection, related to the examiner's
18 submission specifically, is that that confidentiality agreement
19 operates as sort of a post-hac designation of the submission as
20 confidential.

21 THE COURT: But designating it as confidential
22 wouldn't do it in my view. I mean, you can try and persuade me
23 otherwise, but -- designated as confidential wouldn't preserve
24 privilege. Privilege is only preserved if there's a
25 written -- if there's a protective order that's been entered by

1 the Court that has that protection built in.

2 Bear with me, please.

3 (Pause)

4 THE COURT: Rule 502(d) and (e) -- this Rules of
5 Evidence -- are the two applicable provisions. 502(d): "A
6 federal court may order that the privilege or protection is not
7 waived by disclosure connected with the litigation pending
8 before the court -- in which event the disclosure is not a
9 waiver in any other federal or state" court. Well, the uniform
10 protective order had provisions on that. And then 502(e),
11 "Controlling Effect of a Party Agreement. An agreement on the
12 effect of disclosure in a federal proceeding is binding only on
13 the parties to the agreement, unless it is incorporated into a
14 court order." So it's those two provisions that I look to to
15 determine whether Ally has gained protection from disclosure in
16 the actions in which it's not a party in Minnesota or here.

17 And Mr. Nesser argued on the MBIA case -- it wasn't in
18 the papers, but he argued, well, we think it's subject -- we
19 think the submission was subject to the uniform protective
20 order, not just the confidentiality agreement. Well, then lo
21 and behold, it's not entirely clear but -- the designation
22 isn't exactly the same, but I mentioned I read that from the
23 MBIA submission paper they referred to it as being subject to
24 protective orders. Well, there's only one. But they're not
25 objecting to producing it.

1 I didn't want to be in a position of ordering
2 production of the MBIA submission papers when I saw there was
3 two, there was a reply that referred to your client -- referred
4 to Ally's submission. And I said, well, I better see
5 what -- whether Ally has preserved privilege or work product as
6 to it before I say that MBIA can produce their reply that
7 addresses what's in the Ally submission. And the
8 confidentiality agreement may be effective for parties to
9 review it but not as to Mr. Russell's clients. What's your
10 view of that?

11 MR. PARISH: Well, the -- I'm sorry. Could you ask
12 the question again? I'm not sure I understood.

13 THE COURT: Well, on what basis do you believe Ally
14 should not be required to produce, subject to whatever
15 confidentiality provision is in place in the Minnesota actions,
16 its examiner submission?

17 MR. PARISH: I think the position that we set out in
18 our papers is that it is protected by the confidentiality
19 agreement, which operates as a designation under the protective
20 order.

21 THE COURT: No, it doesn't. Come on. Where do you
22 derive that from? Well, first off, even -- it wouldn't get you
23 there because you didn't designate it as highly confidential.
24 The uniform protective order requires, in order to gain that
25 protection for attorney-client privilege and attorney work

1 product, that you designate things as highly confidential. And
2 I don't magically pull out of the air the designation of highly
3 confidential when no designation whatsoever appears.

4 MR. PARISH: I don't have a further response.

5 THE COURT: Okay.

6 MR. PARISH: The issue here, and that's complicating
7 my ability to respond to the question is the request for an
8 examiner submission was not made specifically. The request
9 that we're dealing with on the defendant's motion and the
10 briefing has been for the examiner production. So it may be
11 possible that there is some indication of a highly confidential
12 designation. I have not --

13 THE COURT: Well, what indication?

14 MR. PARISH: In a cover letter in --

15 THE COURT: I asked you for the document. I got the
16 document from you.

17 MR. PARISH: There may be a cover letter. There may
18 be some other document. I don't know the answer to that.

19 THE COURT: Anything else you want to add at this
20 point?

21 MR. PARISH: Pardon me?

22 THE COURT: Is there anything else you wish to add at
23 this point?

24 MR. PARISH: No, Your Honor.

25 THE COURT: All right, Mr. Nesser.

1 (Pause)

2 MR. NESSER: Your Honor, I have a famous Quinn Emanuel
3 handout. Would that be okay?

4 THE COURT: Sure. Did you give it to Mr. Russell?

5 MR. NESSER: I did not.

6 THE COURT: Could you give one to Mr. Russell?

7 MR. NESSER: Yes.

8 THE COURT: Let me ask. Mr. Russell, do you have any
9 objection to Mr. Nesser showing me his handout?

10 MR. RUSSELL: I haven't seen it, yet, Your Honor, but
11 I have no objection, no.

12 THE COURT: Okay.

13 MR. RUSSELL: I'm used to Mr. Nesser springing
14 handouts in Minnesota with no prior notice, so I don't see why
15 this should be any different.

16 MR. NESSER: Your Honor, we prepared this just to run
17 through how we perceive the confidentiality agreement and
18 protective order to interact with one another. From the
19 discussion with counsel, it appears to me that most of that is
20 already clear to the Court. I think the only portion of this
21 that I would direct the Court's attention to are Roman numerals
22 II and III.

23 So Roman number II, we reproduce language from
24 paragraph 1 of the protective order, in which it states that
25 "Confidential information means anything that is marked or

1 designated by such disclosing party as being confidential."

2 And the emphasis for today's purposes is marked or designated,
3 in the alternative; so even if the document is not marked, it
4 may still be designated, and thereby become confidential
5 information under the protective order.

6 And then in turn, in Roman numeral III, the
7 confidentiality agreement, as we read it, as reflected here,
8 states that "Submission papers shall be and shall remain
9 confidential." And that, in our view, is a designation under
10 the protective order, by the parties.

11 THE COURT: It's not, okay, but go ahead.

12 MR. NESSER: And I am not, Your Honor, contending that
13 this language on its own is a designation that the submissions
14 are highly confidential, which I know is the focus of Your
15 Honor's questioning to counsel before I stood up, but it does
16 seem to us to be the case that it is a direct designation of
17 the examiner's submissions as subject to the protective order,
18 which then is reflected --

19 THE COURT: Go ahead.

20 MR. NESSER: -- which then, as Your Honor has
21 observed, at least in the case of MBIA, the parties -- MBIA
22 itself understood that to be the case at the time.

23 THE COURT: Well, they did and they didn't. They
24 didn't because they didn't designate their submission as highly
25 confidential.

1 MR. NESSER: Well, we can discuss with --

2 THE COURT: Well, come on.

3 MR. NESSER: MBIA may want to offer a view as to why
4 they did or didn't do that.

5 THE COURT: MBIA already offered its view. It says it
6 does not object to the production.

7 MR. NESSER: That I understand. It may be that MBIA
8 didn't consider the submission to be attorney work product.
9 But clearly --

10 THE COURT: I raised the question during the hearing.
11 I said -- I looked at it and it looks quintessentially work
12 product.

13 MR. NESSER: And for whatever reason, maybe they're
14 waiving work product. I don't know, but what I do know is that
15 the document, on its face, states that it's subject to a
16 protective order. Your Honor, I'll say that based on our
17 review, MBIA is not the only party in its examiner submission
18 to include a stamp like that. Ally did not, but others did.

19 THE COURT: Okay.

20 MR. NESSER: And so we think it's not only clear on
21 the face of the confidentiality agreement and protective order
22 that this is how they are supposed to work, but we also think
23 it is clear from the parties' practice that this is how they
24 were conducting themselves.

25 I'd like to make -- I'd like to respond to a series of

1 questions Your Honor has been posing today, which is, well, if
2 you didn't designate it highly confidential, therefore, you
3 don't get to preserve your work product under the protective
4 order language, and so --

5 THE COURT: It's paragraph 25 of the --

6 MR. NESSER: Correct, and so how on earth, Your Honor
7 is asking, do you now get to stand up and say that this is not
8 subject to disclosure?

9 THE COURT: That's a good question, so why don't you
10 answer it?

11 MR. NESSER: And what I'll say is that, first of all,
12 as Your Honor observed, the disclosures -- each of the
13 submissions include materials that the submitting party had
14 received from others.

15 THE COURT: Okay, so with respect to MBIA, which I
16 read very carefully --

17 MR. NESSER: Um-hum.

18 THE COURT: -- it appeared to me it included
19 everything they had received pre-petition in their discovery.
20 Discovery was done. Their expert -- mostly they rely on their
21 own expert reports. It's not examiner submissions. They had
22 at least two actions. I guess there was one that discovery was
23 not yet done, but one of them where they say fact discovery was
24 done. Their expert reports were done. They probably already
25 had a brief written, but I'm not -- look, let me make clear.

1 I'm not deciding today whether -- that every examiner
2 submission by any other party is or is not entitled to any
3 protection and having ResCap label its examiner submission
4 paper.

5 MR. NESSER: Your Honor, I don't know the answer to
6 that standing here. But what I'm trying to -- the point I'm
7 trying to make, Your Honor, is, as Your Honor observed, MBIA's
8 submission cited Ally's submission. Ally's --

9 THE COURT: Only their reply; only their reply.

10 MR. NESSER: Correct. I have not -- correct. Ally's
11 submission that we're talking about today cites AIG's
12 submission, FHLB's submission, MBIA's submission, the JSN's
13 submission and standing committee's -- the steering committee's
14 submission. All of those were subject to the protective order,
15 as well.

16 THE COURT: Well, I don't know whether -- don't tell
17 me they're subject -- I'm not buying into your argument that
18 this stuff is subject to the protective order. Okay. And I'm
19 not going to decide that in the abstract. Your telling me it
20 so doesn't make it so. There was a separate confidentiality
21 agreement not approved by the Court, pursuant to which
22 submission papers were exchanged.

23 MR. NESSER: Um-hum.

24 THE COURT: Whether anybody submitting one of those
25 sought to cloak it within the uniform protective order, I don't

1 know. Ally did not. I know that. Whether anybody else did, I
2 don't know.

3 MR. NESSER: Your Honor, I think the answer is that it
4 was not necessary for Ally to make that designation on the
5 paper because all of the parties had already made that
6 designation in the confidentiality agreement. That was the
7 purpose of the confidentiality agreement.

8 THE COURT: Well, confidentiality agreement only
9 applies between the parties to that agreement. It does
10 not -- you don't gain protection of a document that's otherwise
11 not protected by having a bunch of parties sign an agreement
12 and don't get approval from the Court.

13 MR. NESSER: And I don't -- and I don't mean to
14 disagree with that in any respect. What I'm suggesting, Your
15 Honor, as Mr. Parish suggested, is that Ally understood the
16 confidentiality order to be operating as a desi --

17 THE COURT: I don't care what Ally -- what it thinks.
18 It's subjective belief which you can't make statements about.
19 You're not -- I'm sorry; I don't mean this pejoratively, but
20 you're not competent to tell me what Ally believed when it
21 produced a submission paper. Okay.

22 There was a uniform protective order in place. There
23 was a separate confidentiality agreement. The uniform
24 protective order grants certain protections because it had the
25 imprimatur of the Court's approval. The confidentiality

1 agreement didn't. Subjective beliefs are not relevant to this
2 inquiry, and you're not competent to tell me what their
3 subjective beliefs are.

4 MR. NESSER: Your Honor, I apologize, and I was not
5 meaning to do that. I only was repeating what I thought I
6 heard Mr. Parish say. But ultimately, I think the real issue
7 and real arguments, Your Honor, boils down to Roman numerals II
8 and III on this piece of paper. And if you agree with us, then
9 you do, and if you don't -- if you're not following us on that,
10 then I think that you're not following us.

11 THE COURT: Look, Roman II --

12 MR. NESSER: Yes.

13 (Pause)

14 THE COURT: All right, what I'm looking at is I'm
15 looking at 107(b) of the Bankruptcy Code, which doesn't have
16 the exact same wording, but the whole concept of
17 confidentiality and protective orders, in my view, is derived,
18 at least in the first instance, by what's protectable under the
19 Bankruptcy Code in 107(b), and then in the practicalities of
20 discovery, so you don't have to litigate every single document.
21 Protective orders have provisions about parties in good faith
22 can designate documents. And then there are procedures. If
23 somebody wants to dispute it, they can come to court, if they
24 can't work it out.

25 The fact that information may have proprietary and

1 confidential nonpublic information doesn't mean it's
2 protectable from discovery. It may mean that discovery will
3 only be granted pursuant to a protective order. And in many
4 instances, before a written protective order is in place, I
5 will simply, to expedite matters, say I'm so ordering a
6 transcript to provide it's attorney's-eyes only, until the
7 parties work out the terms of a protective order. And usually
8 within a week I get it.

9 What I'm always careful about is that it doesn't
10 hamstring me from making any determination about what can come
11 into evidence and things like that, but what you're -- Roman II
12 specifically says, "marked or designated by such disclosing
13 parties being confidential."

14 And every firm has got their confidential stamp that
15 they impress on at least the first page of each document that
16 it wants to be designated as confidential. And this protective
17 order has additional categories, "highly confidential" being
18 one, which certainly applies to privilege and work product
19 information. Anything else you want to add?

20 MR. NESSER: Just two things, if I may.

21 THE COURT: Go ahead.

22 MR. NESSER: And if Your Honor thinks it would be
23 productive, which of course you can't prejudge.

24 THE COURT: You always ask so nicely, though, Mr.
25 Nesser, I always want to listen to what you have to say.

1 You're a reasonable man; I'm willing to listen to you.

2 MR. NESSER: I'll try -- I'll try my damndest. The
3 first is that as I've been trying to argue, each of these
4 submissions cites, in turn, other submissions. And so to the
5 extent --

6 THE COURT: But MBIA opening submission does not.

7 MR. NESSER: I'm sorry?

8 THE COURT: The MBIA opening submission does not.

9 MR. NESSER: Yes, and I apologize for continuing to
10 trip over that one, but the Ally submission certainly does
11 refer to at least five other examiner submissions. And AIG is
12 not here; the FHLB is not here; the JSN is not here; the
13 steering committee is not here. And so if their confidential
14 submissions are going to be disclosed, they ought to have an
15 opportunity to participate. And that was the purpose of the
16 protective order and confidentiality agreement, which is to say
17 we're going to have an examiner process, and it should be
18 shielded. That's point number one, and I won't go further.

19 Point number two is that I just did want to address
20 something Your Honor mentioned last time, which is I had said
21 that, in our view, this issue is analogous to the issue that
22 Your Honor resolved with respect to the mediation order.

23 THE COURT: And you didn't get much traction from me
24 on that argument.

25 MR. NESSER: I got no traction whatsoever, Your Honor.

1 And what Your Honor told me at the time was, well, look, that's
2 because there's a recognized mediation privilege and there is
3 no recognized examiner privilege.

4 THE COURT: Right.

5 MR. NESSER: And I and I did just want to indicate
6 today, and if -- I think this is responsive to the comment, but
7 perhaps not. Your Honor's decision last year held that Second
8 Circuit's decision in Teligent requires exceptional
9 circumstances in order to lift a mediation -- lift a protective
10 order.

11 Teligent, by its terms, Your Honor, is not
12 limited -- the standard in Teligent, by its terms, is not
13 limited to mediation documents. And in fact, Teligent
14 explicitly cites SEC v. TheStreet.com, a 2001 Second Circuit
15 decision that, at page 229, explicitly holds that the
16 exceptional circumstances test applies to any protective order.

17 THE COURT: Let me put -- let's put aside the
18 submission paper.

19 MR. NESSER: So that's --

20 THE COURT: Let's put it aside. You can't seriously
21 be contending that because documents were produced to the
22 examiner pursuant to the uniform protective order -- putting
23 aside the submission paper -- that the documents suddenly gain
24 protection from discovery in other actions?

25 MR. NESSER: Your Honor, what I'm trying to say is

1 that --

2 THE COURT: Well, answer my question. Are you
3 contending that if Ally produced business records, that by
4 producing them to the examiner pursuant to a subpoena, subject
5 to the uniform protective order, that Ally gains protection
6 from having to produce the documents in third-party litigation?
7 Do you have any case that says that?

8 MR. NESSER: That is not the argument that I'm making
9 here, Your Honor.

10 THE COURT: Well, I'm trying to separate out, and
11 that's why I -- the documents that Ally produced -- well, let
12 me -- I want to understand.

13 Putting aside the documents Ally produced pursuant to
14 subpoena from the examiner, and that were made subject to the
15 uniform protective order, do you believe that Ally gains
16 protection against disclosure in the third-party actions either
17 before me or before Judge Nelson, by having produced documents
18 to an examiner?

19 MR. NESSER: No.

20 THE COURT: Okay.

21 MR. NESSER: I do think that Ally gains protection as
22 to its submission paper to the examiner.

23 THE COURT: Well, I've been troubled by the submission
24 paper. I mean, no question about it.

25 MR. NESSER: And as Your Honor will recall, we

1 consent -- the plaintiffs consented to MBIA's production of the
2 documents underlying MBIA's submission paper.

3 THE COURT: All right.

4 MR. PARISH: So I'm not making an argument about the
5 underlying documents. I'm making an argument about the brief.

6 THE COURT: Can you just tell me why -- I didn't ask
7 you this at the last hearing, but I remember their paper is
8 replete with references to their expert reports. I assume that
9 those were produced, as well, as part of the documents
10 submitted.

11 MR. NESSER: I believe so.

12 THE COURT: Yeah. I mean, it's heavily cited
13 throughout. They were probably produced in the litigation
14 before the bankruptcy, but I don't know that.

15 MR. NESSER: I am not -- I should say I am not
16 certain. I believe so. If it's material, we can let Your
17 Honor know separately.

18 But Your Honor, that is the argument that we're
19 making, that when they made a confidential submission to the
20 examiner, that they understood it to be subject to the
21 protective order. I shouldn't say that they understood it to
22 be. That the protective order covers, and that the
23 confidentiality agreement covers --

24 THE COURT: Well, you say they understood. You're
25 falling in the same trap again, telling me what Ally's

1 subjective belief was.

2 MR. NESSER: That's why I immediately stepped back
3 from that cliff. What I -- to say nothing of the sword of
4 Damocles hanging over my head.

5 THE COURT: Not exactly.

6 MR. NESSER: What I mean to say is not subjective.
7 What I mean to say is actually objective. The protective order
8 says that confidential documents -- the protective order says
9 that documents designated confidential are not to be disclosed.
10 And the confidentiality agreement says the following documents
11 are confidential. Period. And that's our -- that's how we
12 read the documents, and that's how the documents fit together.
13 And it makes sense, Your Honor, because when Your Honor entered
14 the protective order --

15 THE COURT: If I accept what you've just told me, any
16 piece of paper, whether it was designated as confidential or
17 not, you say is automatically designated confidential? What's
18 the whole point about a protective order that says, okay, if
19 you believe it's confidential, stamp it confidential.

20 MR. NESSER: Your Honor, respectfully, two responses.
21 Number one, that's not what the protective order says. What
22 the protective order says is you can mark it or designate it,
23 either.

24 THE COURT: Okay, Mr. Parish, do you have some
25 designation of the submission as confidential?

1 No, stop.

2 Do you have -- there's nothing on it, Mr. -- you're
3 making it up as you go.

4 MR. NESSER: No, I'm not. There's nothing on the
5 document. I'm not contending there's anything on the document.
6 What I'm contending, Your Honor, is that the defendants make
7 this argument in their papers, that the confidentiality
8 agreement was a very narrow document covering a very narrow
9 category of documents.

10 The only thing that the confidentiality agreement
11 covers are examiner submissions. And so what the parties did
12 in the confidentiality agreement -- the meaning of the
13 confidentiality agreement precisely was a statement by the
14 parties that their examiner submissions are going to be
15 confidential. That is what the document is.

16 THE COURT: Show -- which is the provision of the
17 protective order you're relying on that you believe makes
18 anything confidential?

19 MR. NESSER: Paragraph 1 -- of the protective order?

20 THE COURT: Yeah.

21 MR. NESSER: Paragraph 1, confiden -- it's Roman
22 numeral II on my handout.

23 THE COURT: Well, show me where Ally designated its
24 submission -- where they marked or designated its submission as
25 being "confidential".

1 MR. NESSER: In paragraph 1 of the confidentiality
2 agreement.

3 THE COURT: No. No. No. No. No. No. You don't
4 produce documents without a designation and say -- and come
5 back later and say, oh, but that was confidential. This
6 requires -- the language you're referring to requires
7 "proprietary and confidential nonpublic information, whether in
8 writing or orally or in any other format, produced, provided,
9 given, or exchanged by disclosing party defined below, that is
10 marked or designated by such disclosing party as confidential."

11 MR. NESSER: Correct.

12 THE COURT: So show me what Ally -- where did they
13 designate its submission as confidential? I haven't seen a
14 single scrap of paper --

15 MR. NESSER: Ally --

16 THE COURT: -- where they designated their submission
17 as confidential.

18 MR. NESSER: Ally signed a piece of paper in which it
19 stated -- in which is stated that its submission paper "shall
20 be and shall remain confidential."

21 THE COURT: So you're relying on the separate
22 confidentiality agreement.

23 MR. NESSER: Correct, and if Your Honor disagrees with
24 our reading, then I'll sit down, but that is the argument we're
25 making.

1 THE COURT: All right. I'm going to take the matter
2 into submission with -- I'll take it under submission with
3 respect to the examiner submission, the Ally examiner
4 submission. I'm not taking it under submission with respect to
5 the examiner production, which means everything other than the
6 examiner submission.

7 I'm requiring that the moving parties and Ally's
8 counsel confer promptly and seek to reach an agreement as to
9 what will be produced and when it will be produced. If there
10 are remaining disagreements that you can't resolve, you
11 can -- the party needing the assistance from the Court can call
12 my chambers, and we'll do it by telephone. It shouldn't
13 happen. Okay? And as I said, this needs to get done quickly,
14 because there are discovery deadlines in place here, discovery
15 deadlines in Minnesota.

16 With respect to the examiner submission, I certainly
17 saw in the Ally's -- actually, in the MBIA reply, I saw it
18 refer to two examiner submissions, Ally and ResCap. It's a
19 long document, but I believe those were the two that it
20 referred to, it addressed in their reply. Can you address
21 that, Mr. Nesser?

22 MR. NESSER: Your Honor, I know that the MBIA reply
23 cites to the Ally submission. Standing here, I don't know --

24 THE COURT: It referred to the ResCap submission
25 too. Or debtors, it may have been. I can look. I have it

1 here. But it referred to debtors. I didn't see it referring
2 anything other than AFI and debtors.

3 MR. NESSER: That may well be the case, Your Honor.
4 I've no reason to doubt that. It also, I believe, refers to
5 documents that various parties produced.

6 THE COURT: I don't think -- it has all the production
7 numbers from their prior litigation.

8 MR. NESSER: Certainly, the Ally submission cited
9 documents that had been -- that it had obtained from various
10 other parties, confidential documents it had obtained from
11 other people. And it's the same argument I've been trying to
12 make, which is those parties' confidential information, and the
13 way one might expect it to operate is that they have an
14 opportunity to be involved. But for reasons that are not
15 clear, the defendants haven't been pressing -- either didn't
16 issue or haven't been pressing discovery requests as to those
17 other parties.

18 THE COURT: Well, I think under the -- if you believe
19 the uniform protective order applies, Ally should have notified
20 any party that they've received a subpoena for documents that
21 somebody else protects as under the protective order. So
22 don't -- Ally had that responsibility. You disagree with that?

23 MR. NESSER: Your Honor, my view is that confidential
24 designations --

25 THE COURT: Do you disagree with that? The protective

1 order -- if the uniform protective order applies, it has
2 provisions requiring a party to give notice when it receives a
3 subpoena for anybody else's protected information.

4 MR. NESSER: Yes, I agree with that. And I agree that
5 if my memory of Boeing is correct, then one would have thought
6 that any of the parties had an obligation to notify everyone
7 else. I don't know whether Ally did that or not, but I --

8 THE COURT: Mr. Parish, do you know whether Ally
9 notified anybody else that there was a subpoena that would call
10 for anybody else's confidential or protected information?

11 MR. PARISH: Your Honor, I don't know the answer to
12 that.

13 MR. NESSER: Your Honor, but I also don't know why it
14 ought to matter. If there is a designation of a document as
15 confidential, then that doc -- assume with me for the moment,
16 Your Honor, that my crazy argument is correct; the documents
17 marked confidential are, in fact, subject to the Court's
18 protective order. The failure of Ally to notify those parties
19 or the notification of Ally of those parties --

20 THE COURT: Well, they can come back and -- they can
21 come back and sue Ally for failing to --

22 MR. NESSER: I suppose they could, but in any event,
23 whether Ally does that or not, the documents are still
24 protected by a court order. The fact that Ally may or may not
25 have notified them doesn't strip the protection that was

1 accorded those documents by the Court. Frankly, I don't see
2 how it could strip --

3 THE COURT: Well --

4 MR. NESSER: -- any protection that exists by virtue
5 of the parties' own agreements. I mean --

6 THE COURT: The only thing that would be protected
7 from disclosure, in my view, Mr. Nesser, is highly confidential
8 information, documents that are -- it's what I said before.
9 You don't gain protection over documents simply because you
10 think they're confidential.

11 MR. NESSER: And as I said --

12 THE COURT: That doesn't protect them from disclosure.

13 MR. NESSER: Yeah, and as I said, we are not making
14 any argument with respect to the underlying documents. What
15 Ally's position on that is not my concern. I don't know what
16 their position is. Our position is that the examiner
17 submission itself is and was always a confidential document
18 subject to the protective order. And I don't think there's any
19 great prejudice to any --

20 THE COURT: A confidential document would not provide
21 it protection from disclosure. If it's a work product and yet
22 it was designated as highly confidential, it may well have some
23 protection. But just saying confidential does not protect it
24 from discovery.

25 MR. NESSER: I would have thought that, at minimum, it

1 protects it from discovery in so far as it is relied upon,
2 citing, or quoting other parties' confidential materials.

3 But --

4 THE COURT: We'll see.

5 MR. NESSER: -- I recognize I've reached the end of my
6 road.

7 THE COURT: All right. We're stop -- we're stopping
8 now.

9 MR. NESSER: And so I'll stop before I get cut off.

10 THE COURT: We're stopping now. Okay.

11 So Mr. Parish, you understand you need to confer with
12 Mr. Russell, and promptly resolve -- and I guess what I would
13 ask is that -- if you provide the Court with a status letter by
14 next Tuesday at 5 o'clock, that'd give you a week to get these
15 issues resolved. That's going to -- that should resolve
16 everything other than the examiner submission issue. Okay?

17 MR. RUSSELL: Understood. Thank you, Your Honor.

18 THE COURT: Okay. All right. We're adjourned.

19 MR. NESSER: Thank you, Your Honor.

20 (Whereupon these proceedings were concluded at 3:11 PM)

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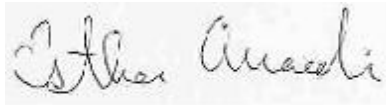
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C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.



ESTHER ACCARDI

AAERT Certified Electronic Transcriber CET**D 485

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700 West 192nd Street, Suite #607

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Date: April 20, 2016

(1) ability - certain

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